No. 15,019

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES MEREDITH,

Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL ELIZABETH SCRUGGS, ATLEE GAIL SCRUGGS, MERI-JO ABRAMS and LOUIS EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court for the District of Hawaii.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable William Denman, Chief Judge and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

We respectfully petition this Court for a rehearing upon the following grounds:

(1) This Court erred in holding that Hawaiian judicial precedent established a cause of action in favor of minor children for injuries sustained by their mother.

(2) This Court erred in holding that appellant did not question that the injury to the mother "caused a loss" to the children.

(3) This Court erred in misconstruing Section 12264, Revised Laws of Hawaii 1945, as giving children a legal right to the personal attention of their mother.

(4) The Supreme Court of Hawaii, because of the decision of this Court, has accepted for review the same question of law in the case of *Halberg et al. v. Young*, No. 4006. A copy of the question certified to the Supreme Court of Hawaii in said case and now awaiting determination is set forth in the appendix.[1] In the exercise of a sound judicial discretion, this Court should not act on this petition but should stay its hand until the Supreme Court of Hawaii has passed upon the question.

I.

NO HAWAIIAN DECISION ESTABLISHES A CAUSE OF ACTION IN FAVOR OF A MINOR CHILD FOR THE NONFATAL INJURIES TO HIS PARENT.

In Hawaii minor children have no claim for damages resulting from the nonfatal injuries sustained by a parent by reason of the negligent conduct of the defendant. This has been the law in this jurisdiction

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[1]The record in *Halberg v. Young* was docketed in the Supreme Court on November 8, 1956. As counsel for appellant Young, our opening brief was filed November 30, 1956. Appellees' brief is due December 15, 1956. We expect a prompt disposition by our Supreme Court.

from the beginning of our legal history. The decisions of our Supreme Court which have created a new cause of action in favor of a child or parent all involve cases of wrongful death. None affords any basis for the novel extension of tort law to the creation of the cause of action alleged in this complaint.

One of the earliest cases in our reports on wrongful death is *Kake v. Horton,* 2 Hawaii 209 (1860). In that case the court sustained the claim of a widow to recover damages for the wrongful death of her husband. This was an innovation not known to the common law and was predicated upon Section 14 of the Civil Code of 1859 which authorized the court to apply

> . . . necessary remedies to evils not specifically contemplated by law.

This provision of the Civil Code of 1859 was repealed by Act 57, Session Laws of 1892, which established the common law in Hawaii, which act is now Section 1, R.L.H. 1945, and provides:

> Sec. 1. *Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *PROVIDED,* however, that no person shall be subject to criminal proceedings except as provided by the written laws of the

> United States or of the Territory. (R.L.H. 1945, Sec. 1)

This statute has been in force in Hawaii since 1892 without material change.

The common law did not recognize the existence of the claim for relief here asserted. While it is true that this statute does not confine the Hawaiian courts to a fixed set of precedents but allows a degree of flexibility to meet changes in the common law as they develop (*Vierra v. Campbell & Moody,* 40 Hawaii 86 (1853); *Welsh v. Campbell,* 41 Hawaii 106 (1955)), nevertheless where, as here, there is a unanimity of judicial authority opposing the claim asserted and, where no Hawaiian statute or judicial precedent upholds such claim, then the Hawaiian courts do not ignore the command of the statute, but apply the common law.

A case in point is *Hall v. Kennedy,* 27 Hawaii 626 (1923). In that case the dependent parents of an adult child sought damages for loss of support arising out of the death of the child in an accident. The court stated:

> An action to recover damages for the death of a relative was not known to the common law. (p. 627)

The court pointed out that in 1892 the Territory, then a kingdom, had enacted what is now Section 1, R.L.H. 1945. The court stated:

> *The rule of the common law applicable to the question involved herein, not having been altered*

> *by the Constitution or laws of the United States* or (until the enactment of Act 245, S.L. 1923) by the laws of this Territory, *must therefore be our guide* in the instant case unless it can be said that a contrary rule of law has been 'fixed by Hawaiian judicial precedent, or established by Hawaiian usage.' (p. 628; emphasis supplied)

Our Supreme Court in the case just cited followed the command of the Hawaiian statute and did not fall into the error against which the learned Cardozo warned:

> Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. (Cardozo, *The Nature of the Judicial Process,* p. 129)

In *Hall v. Kennedy,* 27 Hawaii 626, 629, (123), referring to the *Kake* decision, our Supreme Court said:

> The cases of *Kake v. Horton* and *Ferreira v. Hon. R.T. & L. Co.* above cited are undoubtedly authority for the proposition that, as 'fixed by Hawaiian judicial precedent' the common law rule denying a right of action to a widow for the wrongful death of her husband or a right of action to a father for the wrongful death of his minor son, has been abrogated in this jurisdiction. But, in conceding that the cases cited go to such lengths, it does not follow that, in the case of the death of an adult, a person dependent upon the de-

> ceased, even if such dependent be the father or mother of deceased, has, in the absence of statute, a right of action against the person causing the death of deceased. In *Kake v. Horton* the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the *Ferreira* case for, since by law a father is entitled to the earnings of his son during the son's minority, a right of action may be maintained by the father against one who, by causing the son's death, deprives the father of that legal right. Where, however, no legal right is infringed, no right of action may be maintained.

Again in *Wada v. Associated Oil Co.,* 27 Hawaii 671, 673 (1924), which was an action brought for consequential damages suffered by a father by reason of the death of his son caused by the alleged negligent act of plaintiff, our court said:

> The instruction as given substantially follows the rule enunciated by this court in the case of *Ferreira v. H.R.T. & L. Co.,* 16 Hawaii 615, 628, where this court, consonant with its *renunciation of the common law rule that no action lay for the taking of human life* (see *Kake v. Horton,* 2 Hawaii 209), held that an *action could be maintained in this Territory by a father for the death* of a minor child and . . . (Emphasis supplied).

It is obvious from the decision in *Hall v. Kennedy, supra,* and from the subsequent death cases in Hawaii such as *Gabriel v. Margah,* 37 Hawaii 571 (1947), and *Young v. H.C. & D. Co.,* 34 Hawaii 426 (1938), that departure in our judicial decisions from the common law in *Kake v. Horton,* 2 Hawaii 209 (1860), was confined to cases involving wrongful death where the party suing could claim damage directly resulting from the deprivation of some legal relationship. After the adoption of the common law, the Hawaiian courts refused to broaden the *Kake* rule to include other classes of cases.

Moreover, it is apparent from the language in the opinion in the *Kake* case itself that, had it not been a case where the death of the husband had resulted from the injury, an action would not have been allowed, for the court said:

> We are of the opinion that much of the law read by the learned counsel for defendant, as well as a great part of their argument, is inapplicable to the question at issue.
>
> *They treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery,* committed on her deceased husband, Charlie Pihaole; whereas, as we understand the matter, *it is an entirely different thing, being an action on the case, to recover for consequential damage resulting to the plaintiff by reason of the death of her late husband,* which she alleges to have been caused by the wrongful act of the defendant, Horton. (p. 210; emphasis supplied)

The Hawaiian legislature has broadened the remedies allowed in wrongful death cases. Thus, as pointed out in *Hall v. Kennedy,* 27 Hawaii 626 (1923), a statute had been enacted, by the time that case was decided, which allowed actual dependents to recover in death cases. This statute is now Section 10486, R.L.H. 1945. Act 205, S.L. 1955, effective May 27, 1955, extended the damage recoverable in a statutory death action to include pecuniary injury by reason of losses in the nature of those sought in the present case. No attempt, however, was made in the statute to allow recovery of damages for such losses in cases where death did not result from the injury.

A review of the Hawaiian cases, *Kake v. Horton,* 2 Hawaii 209 (1860); *Ferreira v. Hon. R.T. & L. Co.,* 16 Hawaii 615 (1905); *Hall v. Kennedy,* 27 Hawaii 626 (1923); *Globe Indemnity Co. v. Araki,* 32 Hawaii 153 (1931); *Young v. H.C. & D. Co.,* 34 Hawaii 426 (1938); *Gabriel v. Margah,* 37 Hawaii 571 (1947); *Ginoza v. Takai Elec. Co.,* 40 Hawaii 691 (1955); and *Enos v. Hono. Motor Coach Co.,* 34 Hawaii 5 (1936), shows no disposition on the part of our courts to extend the principle adopted in the *Kake* case beyond the limitations previously set forth. On the contrary, the decision in *Hall v. Kennedy, supra,* expressly holds that in obedience to Section 1, R.L.H. 1945, that principle would not be so extended.

The most recent decision of our Supreme Court on the question of creating novel causes of action in tort is the case of *Kamanu v. Black,* 41 Hawaii 442, decided May 4, 1956. In that case our Court

refused to create a cause of action in favor of representatives of a deceased employee covered by the Workmen's Compensation Act. Although pressed to follow the bizarre rule laid down by the Court of Appeals for the District of Columbia, in *Hitaffer v. Argonne, Inc.,* 183 F. 2d 811, the Supreme Court of Hawaii refused to do so.[2]

A review of the Hawaiian statutes, Act 245, S.L. 1923 (now Section 10486, R.L.H. 1945), Act 206, S.L. 1953 (providing for the survival of tort actions), Act 205, S.L. 1955 (allowing recovery of damages in a statutory death action to the same extent as to recovery allowed under *Kake v. Horton, supra*), affords no basis for sustaining the claim here asserted. On the contrary, they all deal with claims arising out of the death of the person injured.

Thus, just as in *Hall v. Kennedy,* 27 Hawaii 626, we have a situation where the common law does not recognize a right to relief and where neither Hawaiian judicial precedent nor statutes can be construed to uphold such a right. It is therefore clear that the substantive law of Hawaii will deny the claim for relief.

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[2]The District Court for Hawaii in the instant case relied upon the discredited *Hitaffer v. Argonne,* saying "It is significant that Hitaffer which recognized a cause of action in the wife, was decided later than Elder and McMillan on which Judge Youngdahl relied as indicating a trend in the District of Columbia." (R. 16). A unique departure from the universal rule by the Court of Appeals for the District of Columbia is hardly evidence of the law of Hawaii; particularly so when that decision has for all practical purposes been put at rest by a per curiam in the same court. *Brown v. Curtin & Johnson, Inc.,* 221 F. 2d 106 (CA DC 1955).

Our reported decisions now encompass forty-one volumes beginning with the year 1847 which antedates by several years the first reported decision of the Supreme Court of California. Surely, if such a cause of action as that alleged here (which was unknown at the common law) actually existed in Hawaii, some allusion to it would be found in our reports. No such reference exists, nor does anything in our history or legislation afford any base for the conclusion that this cause of action is sanctioned by Hawaiian usage. This Court erred when it held that such a liability "has been determined by Hawaiian judicial precedent and usage."

II.

THIS COURT MISCONSTRUED OUR LOCAL STATUTE ON PARENTAL CONTROL.

Section 12264, R.L.H. 1945, provides:

> *Parents' control and duties; binding out of children by judge.*
>
> Parents, or, in case they be both dead, guardians, legally appointed, shall have control over the actions, the conduct and the education of their children during their minority; they shall have the right, at all times, to recover possession of their children by habeas corpus, and chastise them moderately for their good; and it shall be the duty of all parents and guardians to set a good example before their children; to provide, to the best of their ability, for their support and education; to see that they are instructed in a knowledge of religion; to use their best endeavors

> to keep them from idleness and vice of all kinds; and to inculcate upon them habits of industry, economy and loyalty; and it shall be lawful for any judge of any circuit court, on a complaint being laid before him against any parent, that he or she is encouraging their children in ignorance and vice, to summon such parent before him; and, upon its being proved to his satisfaction, to bind out such children during their minority to some person of good moral character, to be well supported, trained to good habits, and taught at least the rudiments of knowledge.

This statute plainly delineates powers, rights and duties of parents. Parents have *a power* over control of the conduct, actions and education of minor children. They have *a right* to the possession of the children and to chastise the children. They have *a duty* to set a good example for the children and *to provide, to the best of their ability,* for the support and education, *and to see* that they are instructed in a knowledge of religion, *to use their best endeavors* to keep them from idleness and vice of all kinds, and to inculcate upon them the habits of industry, economy and loyalty.

In its opinion this Court said:

> The question then is, is there established by 'Hawaiian judicial precedent' and 'usage' the children's right to recover damages from a tort feasor who, by injuring their mother, deprives them of their legal right to the education she gives them, beginning with the 'education' of suckling children in cleanly habits and the names

> of the objects with which they first come in contact and on through their minority and the 'control over their actions' during that time, 'to keep them from idleness and vice' and 'to inculcate upon them habits of industry, economy and loyalty'—rights created by Section 12264, Rev. Laws Haw. 1945. (Opinion, p. 2)

This statute does not give to children any legal right to the education by their parents personally. Parents under this statute are required only to provide their education. As to the duty of the parents to see that they are instructed in a knowledge of religion, that again is not a requirement that the parent personally give them such instruction. As to keeping the children from idleness and vice, the parent is required only to use his endeavors to that end. The same is true of the duty to inculcate habits of industry, economy and loyalty. Nothing in the statute requires that any of the duties of the parent be done by a parent personally.

Moreover, there is no allegation in the complaint that there was a failure as a result of the injury of the mother on her part to carry out any duty to instruct the children in the knowledge of religion or to keep them from idleness and vice or to inculcate upon them habits of industry, economy and loyalty.

It should be noted that the person injured was the children's mother. Nowhere in the complaint is it alleged that the father was unable to carry the duties of a parent under Section 12264, R.L.H. 1945. The

duties set out in that section, of course, devolve in the first instance upon the father and only upon the mother in the absence of the father. Thus the Supreme Court of Hawaii, in construing this statute, has stated:

> Under the provisions of section 2998, R.L. 1915, parents, first the father and then the mother, are required to provide to the best of their ability for the support and education of their children. *Wada v. Associated Oil Co.,* 27 Hawaii 671, 675.

Moreover, there is nothing in Section 12264, R.L.H. 1945, which gives a child *a legal right to the personal education, care, comfort and society of its mother,* and in construing our statute to give such a legal right, this Court committed error. No action for damages can be brought by a child against his parent for breach of the statutory duty. In fact the District Court in this very case recognized that a minor child could not bring an action against his father when it denied appellant's motion to bring in a third party defendant (R. 27). 2 Cooley, *Torts,* 4th Ed. Sec. 174. This error, moreover, was crucial to the case.

As our decisions show, the loss compensated for in the death cases cited by this Court was a pecuniary loss. *Gabriel v. Margah,* 37 Hawaii 571, 582 (1947). The mother has recovered the full pecuniary damage of her loss as a result of the accident. The statute makes the providing of education and support a duty of the parent and if, as here, the parent has recovered his or her pecuniary loss, she is in a position to carry out that duty. The children, therefore, have suffered

no pecuniary loss arising from the injury to the mother.

III.

THIS COURT ERRED IN HOLDING THAT THE FACT OF LOSS BY THE CHILDREN WAS NOT DISPUTED BY APPELLANT.

In its opinion this Court stated:

> The tortious injury to the mother and that it caused a loss to the children of the amounts recovered are not questioned. (Opinion, p. 1)

This is an erroneous statement of appellants' position. Appellant of course disputes the fact that any pecuniary loss has been sustained by the children, for the plain reason that no legal right of the children has been invaded. Section 12264, R.L.H. 1945, gives to appellees no legal right to personal education or the care, comfort or society of a parent. Moreover, until it is alleged and shown that appellees' father has not met the provisions of Section 12264, no duty devolved upon the mother to carry out the provisions thereof, and hence there can be no corresponding right on the part of the child. Even if the father and mother were in default, the remedy of the child would be to enforce compliance by contempt process, not an action at law for damages.

IV.

THIS COURT SHOULD STAY ITS HAND PENDING THE DETERMINATION OF THIS QUESTION BY THE SUPREME COURT OF HAWAII.

As the papers which are attached to this petition establish, the Supreme Court of Hawaii, after the opinion of this Court in this case, accepted on reservation the question of a minor child's right to recover for partial deprivation of the care, comfort and society of its mother (see Appendix, *Halberg v. Young*). Our Supreme Court had previously rejected this same reserved question but because of this Court's opinion in the instant case has now entertained it in order to settle the law of Hawaii on the subject.

The decisions of the Supreme Court of Hawaii on local questions are controlling on the federal courts, *Waialua v. Christian,* 305 U.S. 91 (1938), and the decisions of the highest court of Hawaii "are the natural sources for the interpretation and application" of Hawaiian statutes, *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 383 (1949). It would seem that this Court, in the interests of the preservation of judicial harmony between the federal and territorial court systems in the Territory of Hawaii, should either grant a rehearing or stay its hand on this petition until the Supreme Court of Hawaii has passed on this important question of local law now pending before it. No possible prejudice to appellees can occur. If we are wrong on the law of Hawaii, the Supreme Court will say so and appellees will recover their judgment with interest.

CONCLUSION.

We disapprove of petitions for rehearing. Usually they are nothing more than the post mortems of disappointed counsel. This is not the case here. This Court, by judicial legislation, has created a new cause of action in Hawaii. If this is to be done by a court, not the legislature, the Supreme Court of Hawaii should do it.

We respectfully submit that the petition for rehearing should be granted, and that upon a rehearing the case should be reversed and remanded to the District Court with instructions to vacate the judgment and to dismiss the complaint as to appellees.

Dated, Honolulu, Hawaii,
December 17, 1956.

Respectfully submitted.
J. GARNER ANTHONY,
Counsel for Appellant and Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

Dated, Honolulu, Hawaii,
December 17, 1956.

J. GARNER ANTHONY,
Of Counsel for Appellant and Petitioner.

(Appendix Follows.)

Appendix.

Appendix

No. 4006

In the Supreme Court of the Territory of Hawaii

Emma Marion Halberg and Herbert P. Halberg, individually and jointly, and as natural guardians of Marilyn Sue Halberg, Gerald Leslie Halberg, and David Elliott Halberg, minors,
Plaintiffs,

vs.

Sai K. Young,
Defendant.

QUESTION OF LAW RESERVED TO THE SUPREME COURT.

This cause having come on for hearing upon defendant's motion to dismiss, and this Court having a well-founded doubt upon the following question of law raised by the pleadings and record herein and deeming the reservation of the same and answer by the Supreme Court will best serve the interests of justice in this and prospective and pending litigation in numerous other cases, hereby of its own motion reserves the following question to the Supreme Court for its decision and answer, the defendant maintaining the affirmative thereof:

Should the motion to dismiss be granted on the ground that a complaint of minor children for damages arising out of the disability of their mother, caused by alleged negligence of the defendant, with attendant loss of acts of kindness, care, attention and other incidents of the parent and child relationship, fails to state a claim upon which relief can be granted?

Attached hereto and made a part hereof is the original record in the above entitled cause, including the following:

(1) Complaint and Summons;

(2) Motion to Dismiss.

Witness my hand and seal of this Court this 8th day of November 1956.

(Seal) Calvin C. McGregor,
Presiding Judge, First Circuit, Territory of Hawaii.

Attest:

W. C. Ing, Clerk.